92-792

Supreme Court, U.S.
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No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CARROLL WHITE PUCKETT,

Petitioner,

v.

ALABAMA STATE BAR,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court of Alabama

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PETITION OF CARROLL WHITE PUCKETT FOR WRIT OF CERTIORARI

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*ALVIN T. PRESTWOOD
LINDA G. SMITH
BEN A. FULLER

CAPOUANO, WAMPOLD, PRESTWOOD & SANSONE
Attorneys at Law
350 Adams Avenue
Post Office Box 1910
Montgomery, Alabama 36102
Telephone: (205) 264-6401

Attorneys for Petitioner

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED FOR REVIEW

1. Is the Alabama State Bar's rule which provides for no hearing of any kind to review the results of an examination for admission to the bar violative of due process when the examinee has the right to retake the examination?

2. Is the Alabama State Bar's rule which provides for no hearing of any kind to review the results of an examination for admission to the bar violative of due process when the examinee no longer has the right to retake the examination?

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REFERENCE TO REPORT OF OPINION

The Supreme Court of Alabama denied the Petition for Writ of Mandamus filed by Carroll White Puckett ("Puckett") in *Ex parte Puckett*, 603 So. 2d 908 (Ala. 1992). *See* A-2a.

JURISDICTIONAL STATEMENT

The opinion of the Supreme Court of Alabama was entered on June 26, 1992. A timely application for rehearing was denied by the Supreme Court of Alabama on August 7, 1992. *See* A-1a.

The jurisdiction of this Honorable Court is posited on 28 U.S.C. § 1257(a).

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

Amendment XIV of the Constitution of the United States and the rules governing admission to the Alabama State Bar which are relevant to this case are set out in the appendix hereto.

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STATEMENT OF THE CASE

Puckett has taken and failed the Alabama bar examination five times, the last two being in February 1990 and February 1991. The rules governing admission to the Alabama State Bar do not provide for

any review procedure whereby an applicant who fails the bar examination may challenge the scoring of the essay portion of his examination. In addition, the Alabama State Bar's rules limit to five the number of times an applicant may take the Alabama bar examination. *See* Bar Rule IV D.

Bar Rule VI J.(1) requires a passing combined score of 128 on the Multistate Bar Examination ("MBE") and the essay portions of the Alabama bar examination. Bar Rule VI I.(3) provides that all essay examination papers of persons receiving a score of 125, 126, or 127 shall be regraded. Puckett had a combined score of 124 in 1990 and 118 in 1991; therefore, his essay examination papers were not regraded. He was advised each time that he had failed the examination. Bar Rule VI I.(3) further provides that a failing applicant is entitled to examine his own essay examination "for the purpose of ascertaining that grades were transcribed correctly" and to purchase copies of the questions, his answers, and the model answers. In addition, such applicant may examine the three papers with the highest scores on each portion of the essay examination.

Puckett took advantage of the opportunity to examine all of the available documents relative to his examination in 1990 and 1991. He detected what he believes to be errors in the grading of his essay questions on both occasions. Because the Alabama State Bar has no procedure for review of its bar examinations, Puckett has been unable to challenge the scores he received on his bar examinations in 1990 or 1991.

As a result of the Alabama State Bar's failure to provide any type of review process to applicants who

fail the bar examination, Puckett petitioned the Supreme Court of Alabama for a writ of mandamus directed to the Alabama State Bar requiring it to either show cause why it should not certify Puckett as having passed the bar examination in 1990 or 1991, or in the alternative, why the Alabama State Bar should not provide Puckett with an administrative review of the essay portion of his examination. The Supreme Court of Alabama had original jurisdiction of the cause by virtue of Article VI, § 140 of the Constitution of Alabama of 1901 and Ala. Code § 12-2-7 (1975). Jurisdiction also existed by virtue of the inherent power of the Supreme Court of Alabama to regulate and control matters relating to bar admissions in Alabama under a line of judicial decisions, including *Jones v. Alabama State Bar*, 353 So. 2d 508 (Ala. 1977). Relying on *Jones v. Board of Comm'rs of Alabama State Bar*, 737 F.2d 996 (11th Cir. 1984), the Supreme Court of Alabama found that the right to retake the examination was sufficient to protect an applicant's right to due process, even with the limitation of five examinations, and denied Puckett's petition. *See* A-2a. Puckett's application for rehearing was summarily denied. *See* A-1a.

ARGUMENT

The importance of Puckett's interest in practicing his chosen profession and its entitlement to the safeguards of the due process clause have long been recognized. "A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment." *Schware v. Board of Bar Examiners of*

New Mexico, 353 U.S. 232, 238-39, 77 S. Ct. 752, 756, 1 L. Ed. 2d 796, 801 (1957) (citations and footnote omitted). Puckett respectfully contends that due process requires that an applicant who has failed the Alabama bar examination should be afforded a review process to challenge his score above and beyond the opportunity for reexamination. Puckett also maintains that Alabama's lack of any type of meaningful review process for an applicant who fails the Alabama bar examination, combined with the limited right to take the bar examination five times, is violative of the Fourteenth Amendment's Due Process Clause.

A. Does due process require that an applicant who has failed the Alabama bar examination be afforded the opportunity to challenge his score?

Whether due process requires a specific procedure in any given situation is determined by balancing the individual's interest in circumventing the loss which lack of the procedure imposes upon him against the governmental interest which would be advanced by denying the procedure. *Goldberg v. Kelly*, 397 U.S. 254, 262-63, 90 S. Ct. 1011, 1017-18, 25 L. Ed. 2d 287, 296 (1970). Puckett recognizes that, except for the Fourth Circuit, those courts considering the issue he raises have held that a state is not required to provide the opportunity for a hearing to an applicant who has failed that state's bar examination so long as the applicant has a right to retake the examination. *See Poats v. Givan*, 651 F.2d 495 (7th Cir. 1981); *Davidson v. Georgia*, 622 F.2d 895 (5th Cir. 1980); *Sutton v. Lionel*, 585 F.2d 400 (9th Cir. 1978); *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940, 96 S. Ct. 2660, 49 L. Ed. 2d 393 (1976); *Whitfield v. Illinois Board of Law Examiners*, 504

F.2d 474 (7th Cir. 1974); *Feldman v. State Board of Law Examiners*, 438 F.2d 699 (8th Cir. 1971); *Chaney v. State Bar of California*, 386 F.2d 962, (9th Cir. 1967), *cert. denied*, 390 U.S. 1011, 88 S. Ct. 1262, 20 L. Ed. 2d 162 (1968); *Bailey v. Board of Law Examiners*, 508 F.Supp. 106 (W. D. Tex. 1980); *Singleton v. Louisiana State Bar Association*, 413 F. Supp. 1092 (E. D. La. 1976). *But see Richardson v. McFadden*, 540 F.2d 744 (4th Cir. 1976), *rev'd in part on other grounds*, 563 F.2d 1130 (4th Cir. 1977) (en banc), *cert. denied*, 435 U.S. 968, 98 S. Ct. 1606, 56 L. Ed. 2d 59 (1978).

The Fourth Circuit noted in dictum as follows: "[S]ome courts have held that reexamination is a more effective remedy than review because the administrative burden of allowing challenges was perceived to be too great. We are not persuaded." 540 F.2d at 752 (footnotes omitted). Puckett contends that the administrative burden of allowing a challenge to a bar examination does not outweigh the interest the applicant has in circumventing the loss occasioned by failing the examination. The theory that reexamination satisfies due process standards is inconsistent with established principles of due process. One is entitled to the protections of due process regardless of whether he is entitled to prevail on the merits of his claim. *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424, 35 S. Ct. 625, 59 L. Ed. 1027, 1032 (1915). Whether a reexamination failure could be said to prove that the applicant might have been unsuccessful in a hearing to challenge the results of a previous examination is wholly irrelevant to a due process inquiry. Conversely, successfully passing a reexamina-

tion will not erase the wrongful withholding of a hearing challenging the previous score.

In *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), this Court said that it had not "embraced the general proposition that a wrong may be done if it can be undone." 407 U.S. at 82, 32 L. Ed. 2d at 571 (quoting *Stanley v. Illinois*, 405 U.S. 645, 647, 92 S. Ct. 1208, 31 L. Ed. 2d 551, 556 (1972)). *Fuentes* sustained a challenge to the Florida and Pennsylvania prejudgment replevin statutes on the grounds that they failed to provide hearings prior to the initial seizure of the property, and held that postseizure hearings were inadequate because the owners of the seized property were deprived of their interest in the interim of the continued use and possession of their property. 407 U.S. at 81-86, 32 L. Ed. 2d at 570-73. Likewise, if an applicant for admission to the bar wrote an essay examination which entitled him to admission, but was denied admission on the basis of an alleged failure of the examination, he would be deprived of the right to practice law in the interim between the announcement of the results and the next opportunity to take the examination. "A fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62, 66 (1965) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 5 L. Ed. 1363, 1369 (1914)).

This Court reaffirmed these principles in *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988) when it stated as follows:

> Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, "it is no answer to say that in this particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424, 59 L. Ed. 1027, 35 S. Ct. 625 (1915). As we observed in *Armstrong v. Manzo*, *supra*, at 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187, only "wip[ing] the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." The Due Process Clause demands no less in this case.

485 U.S. at 86-87, 99 L. Ed. 2d at 82 (ellipsis in *Peralta*). The right of reexamination in this case existed when Puckett took his fourth examination in 1990, but a holding that such reexamination satisfies due process requirements is wholly inconsistent with the foregoing established principles. Puckett was denied due process of law when he failed the fourth examination and was provided no meaningful review.

B. Does due process require that an applicant who has failed the Alabama bar examination be afforded a meaningful review process or the unlimited opportunity to retake the examination?

Although Puckett contends that merely extending a right of reexamination does not satisfy the requirements of due process, if reexamination does comport with due process, Alabama's five-time limit rule still results in a due process violation in the absence of any other form of review. The Alabama State Bar

contends that it provides a review procedure by allowing the applicant to see his essay questions, the model answers, and the top three papers in each subject. The right to see one's examination and compare it with others, however, does not satisfy due process requirements in the absence of some additional form of review. *Whitfield*, 504 F.2d at 478.

Several courts have held that a hearing is unnecessary where the applicant has an *unqualified* right to retake a state's bar examination. These courts find that such unlimited reexamination provides the elements necessary to satisfy the requirements of due process. *Lucero v. Ogden*, 718 F.2d 355, 359 (10th Cir. 1983), *cert. denied*, 465 U.S. 1035, 104 S. Ct. 1308, 79 L. Ed. 2d 706 (1984); *Brewer v. Wegmann*, 691 F.2d 216 (5th Cir. 1982); *Poats*, 651 F.2d at 497; *Tyler*, 517 F.2d at 1103; *Whitfield*, 504 F.2d at 478; *Singleton*, 413 F. Supp. at 1099. Most courts have upheld a state's limitation on the number of times an applicant may take its bar examination only if a review process is afforded the applicant if he fails. *See, e.g., Giannini v. Real*, 911 F.2d 354 (9th Cir. 1990); *Whitfield*, 504 F.2d at 478.

Nevertheless, in *Jones v. Board of Comm'rs*, 737 F.2d at 1003, the Eleventh Circuit held that the rules applicable to the Alabama bar examination, limiting to five the number of times an applicant may sit for the bar examination and granting to the applicant a limited right to review his own essay questions, afford applicants adequate due process protection.[1] In so

[1] *See also Cline v. Supreme Court of Georgia*, 781 F.2d 1541, 1543 (11th Cir. 1986) (procedural due process issue regarding taking bar examination controlled by *Jones v. Board of Comm'rs of Alabama State Bar*, 737 F.2d 996 (11th Cir. 1984).

holding, *Jones* disregarded binding precedent in the Eleventh Circuit established by *Tyler*, 517 F.2d at 1089, and disregarded the similar rationale of other circuits.[2] *Jones*, 737 F.2d at 1005 (Hatchett, J., dissenting) ("While other circuits have followed the Fifth Circuit's rationale, the majority today deviates from this binding precedent."). Judge Hatchett stated his position as follows:

> My position in this case is simply stated and supported by all the law on the subject: Applicants who fail a state's bar examination must have either the right to full review of their examinations (a hearing) or have the right to unlimited times to retake the examination.
>
> I dissent from the majority opinion because the limited right of review granted to Alabama bar applicants, combined with the five-time limitation on taking the bar examination, violates due process.
>
> . . . .
>
> Since no unlimited right to retake a bar examination exists in this case, I dissent from the majority's holding that the limited right of review for an Alabama Bar applicant who has failed the examination five times satisfies due process. Without an absolute right to retake the examination, due process mandates a broader review procedure.

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[2] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the Fifth Circuit prior to September 30, 1981.

737 F.2d at 1004-06.

Puckett maintains that *Jones* was incorrectly decided and that the Supreme Court of Alabama should have followed *Tyler*.[3] As Judge Hatchett flatly stated in his dissenting opinion in *Jones*, "without a right to retake the examination, this limited review fails to satisfy due process." 737 F.2d at 1006. If an applicant's right to retake the bar examination is limited to a finite number of times, then the state must provide a hearing process, because there is no reexamination substitute for the due process hearing.

Puckett respectfully requests that this Honorable Court grant his petition for writ of certiorati to review the holding by the Alabama Supreme Court which followed *Jones* and to find that Alabama's lack of a review process and limitation on the number of times an applicant may take the bar examination violate constitutional principles of due process.

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[3] In *Bonner*, the Eleventh Circuit also stated that the old Fifth Circuit "followed the absolute rule that a prior decision of the circuit (panel or en banc) could not be overruled by a panel but only by the court sitting en banc. The Eleventh Circuit decides in this case that it chooses, and will follow, this rule." 661 F.2d at 1209. In *Wilson v. Taylor*, 658 F.2d 1021, 1035 (5th Cir. Unit B 1981), the Court noted that it had "held that when a panel is confronted with two contradictory holdings in this circuit, the court in the latter case would be deemed without power to disregard the precedent established by the earlier panel." *See Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981). This rule is referred to as the rule of "interpanel accord" (*see* 2 Fed. Prac., L. Ed. §3:639), and is followed in all the federal circuits except perhaps the Sixth. *See Speigner v. Jago*, 603 F.2d 1208, 1212 n.4 (6th Cir. 1979), *cert. denied*, 444 U.S. 1076, 100 S. Ct. 1023, 62 L. Ed. 2d 758 (1980).

CONCLUSION

Puckett requests this Honorable Court to grant his petition for writ of certiorari for the following reasons:

(1) The questions presented herein have generated divergent opinions among the circuit courts of appeal and state supreme courts, causing confusion and inconsistency in the law.

(2) The Supreme Court of Alabama relied on an opinion of the United States Court of Appeals for the Eleventh Circuit in which the Eleventh Circuit failed to follow existing precedent in the circuit.

(3) The questions presented herein have not been, but should be, settled by this Court.

Respectfully submitted,

*ALVIN T. PRESTWOOD
LINDA G. SMITH
BEN A. FULLER

CAPOUANO, WAMPOLD, PRESTWOOD & SANSONE
Attorneys at Law
350 Adams Avenue
Post Office Box 1910
Montgomery, Alabama 36101
Telephone: (205) 264-6401

Attorneys for Petitioner
**Counsel of Record*

APPENDIX

APPENDIX
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THE STATE OF ALABAMA——————JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
August 7, 1992

1910744

Ex parte Carroll White Puckett.
PETITION FOR WRIT OF MANDAMUS

(In re: Carroll White Puckett

v.

Alabama State Bar)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

PER CURIAM— Hornsby, CJ., Maddox, Almon, Adams, Houston, Steagall, Kennedy and Ingram, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 7 day of Aug 1992

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1991-92

1910744

Ex Parte Carroll White Puckett

PETITION FOR WRIT OF MANDAMUS

(Re: Carroll White Puckett

v.

Alabama State Bar)

PER CURIAM.

Carroll White Puckett has taken and failed the Alabama Bar examination five times. He files this petition for a writ of mandamus ordering the Alabama State Bar to provide a hearing for review of his bar examination scores. Puckett argues that such a review is required to protect his right not to be deprived of property without due process of law, U.S. Const. amend. XIV. This exact argument has been rejected by the United States Courts of Appeals for the Eleventh Circuit and for the former Fifth Circuit. *Jones v. Board of Comm'rs of the Alabama State Bar*, 737 F.2d 996, *reh. en banc den.*, 745 F.2d 72 (11th Cir. 1984); *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), *cert. den.*, 426 U.S. 940, 96 S. Ct. 2660, 49 L. Ed. 2d 393 (1976).

In *Jones*, the court held:

> "As the district court in this case noted, the probability is staggeringly low that an examinee who received failing scores on the bar examination five different times was each time the victim of error. Thus, even with a five-time limitation, reexamination is a highly effective

method of ensuring that mere mechanical error or arbitrary conduct is not responsible for an applicant's failure.

"Furthermore, applicants to the Alabama bar are afforded additional protection against error and caprice. Rule VI I(3), challenged here by appellants, permits examinees to review their own examination papers 'for the purpose of ascertaining that grades were transcribed correctly.' [*Poats v. Givan*, 651 F.2d 495, 499 (7th Cir. 1981)]. [n. 12]

"Therefore, we hold that the rules applicable to the Alabama bar examination, limiting to five the number of times an applicant can sit for the bar examination and granting a limited right to review one's own examination paper, afford applicants adequate due process protections against the possibility that their interests in practicing law will be limited or denied improperly.

"

"[n. 12] Rule VI I(3) also allows examinees to review the three top papers written on the particular examination that they took. Thus, examinees are afforded the opportunity to detect their own substantive errors in their answers to the examination questions, as well as the possible mechanical errors of the examiner."

737 F. 2d at 1003.

The former Fifth Circuit held in *Tyler* that the opportunity to retake the examination is quicker than, and at least virtually as effective as, a hearing would be in correcting any mechanical or arbitrary grading error, and it held that such a right of reexamination is sufficient to protect an applicant's right to due process. The Eleventh Circuit in *Jones* held the same to be true even with the limitation of five examinations.

Puckett has not advanced any argument that persuades us to decline to follow the above-cited federal court holdings.

WRIT DENIED.

Hornsby, C. J., and Maddox, Almon, Adams, Houston, Steagall, Kennedy, and Ingram, JJ., concur.

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1.

Citizenship Rights Not to Be Abridged by States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RULE IV

PERSONS ENTITLED TO ADMISSION BY EXAMINATION

D. Limitation on Examinations.

There shall be a limit of five times on the number of times an applicant may be examined for admission to the Alabama State Bar; provided however, an applicant who has failed the examination two times shall not be permitted to sit for another examination before the expiration of eleven (11) months after the preceding examination. An applicant who has failed an examination two times must give satisfactory evidence, on or before the date the applicant applies to be re-examined, that applicant has done additional preparation, whether by additional study, tutorial or otherwise, of the subject or subjects upon which the applicant was unsuccessful.

RULE VI

BOARD OF BAR EXAMINERS

I. Preparation, Conduct and Grading of Examinations.

(3) Grading of Examinations. Essay questions will test the applicant's ability to reason logically, to analyze accurately legal problems, and to demonstrate a knowledge of the fundamental principles of law and their application. The grade of the paper shall be measured by the reasoning power shown as well as by the correctness or incorrectness of the answers.

Each examiner shall grade his or her examination papers. After completing the initial grading of all of the examination papers, the examiner may regrade or review any grades before certifying the results to the Secretary. Based upon the combined score of the essay portion of the examination and the Multistate Bar Examination, papers receiving a score of 125, 126, or 127, computed as set forth in Rule VI.J(1), shall be designated by the Secretary to be regraded. Each examiner shall regrade all of his or her papers which have been so designated by the Secretary.

An examiner will be expected to grade the number of papers daily which will permit his or her grades to be received by the Secretary of the Alabama State Bar no later than April 15th following a February examination, and September 15th following a July examination. In the event of the death or disability of, or other emergency, involving an examiner prior to the submission of the grades on his or her portion of the examination, the Advisory Committee of the Board of Bar Commissioners for Bar Examinations shall determine the procedures to be followed in grading those papers.

The Secretary shall make a permanent record in the Secretary's office of the grades attained by each examinee

in each subject, and shall inform each examinee whether the examinee has passed or failed the examination.

An examinee who fails the academic portion of the bar examination will be furnished the following information at the time of notification of the failure: his or her Multistate Bar Examination scaled score, the grade made on each essay examination, and his or her highest combined score.

Within sixty (60) days after the announcement of the results, a failing examinee shall be entitled to examine his or her own papers in the State Bar Headquarters for the purpose of ascertaining that grades were transcribed correctly, and upon payment of $5.00 per section of any essay examination, the examinee will be entitled to receive a copy of the question(s), and of his or her answer(s), and of the model answer(s) and to examine at the State Bar Headquarters the three top papers on that particular examination.

J. Results of Examination.

(1) Basic Rule. MBE scaled scores and essay scores will be combined according to the two methods for combining bar examination scores as described in the National Conference of Bar Examiners' Manual for the Use of Scores of the Multistate Bar Examination. (Methods: 1. Equi-percentile; 2. Standard Deviation.) The combination will be on the basis of the MBE range of scores (0-200), rather than on the basis of the essay range of scores (0-100). An applicant who achieves a combined score of 128.000 or above by either of the two methods passes the academic portion of the bar examination. Scores which are not whole numbers shall be truncated to the next lowest whole number.